IN THE SUPERIOR COURT
OF NEW JERSEY
CRIMINAL DIVISION
SALEM COUNTY
DOCKET NO: 11-08
A.D. #_____

| | | |
|---|---|---|
| STATE OF NEW JERSEY, | ) | |
| | ) | TRANSCRIPT |
| v. | ) | OF |
| | ) | HEARING |
| FRANCIS OSEI-AFRIYIE | ) | |
| | ) | |
| Defendant. | | |

PLACE: Salem County Courthouse
92 Market Street
Salem, New Jersey 08079

Date: October 10, 2008

Before:

HONORABLE WILLIAM FORESTER, J.S.C.

TRANSCRIPT ORDERED BY:

FRANCIS OSEI-AFRIYIE

APPEARANCES:

THOMAS DESIMONE, ESQ., Asst. Prosecutor for Salem, Attorney for the State.

FRANCIS OSEI-AFRIYIE,
Pro Se

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THE COURT: Okay. And we have Mr. Miller who is here and we have Mr. Afriyie, if I'm saying that correctly, who is here. Let me get rid of this matter, Mr. Afriyie, and w'll take care of that.

(Pause)

THE COURT: All right. While she's working on that, I think we can move Mr. Afriyie's matter, can we not.

(Judge speaks about other matters)

THE COURT: Mr. –it's Francis Afriyie. Mr. Afriyie, you want to come forward, sir, and if you'd utilized that microphone there for us, please.

(Pause)

THE COURT: Okay. If I say Afriyie would that be the right?

MR.AFRIYIE: (This microphone is not functioning). Osei-Afriyie

THE COURT: Afriyie, Okay. Mr. Afriyie appears pro se in this municipal court appeal. For the State?

MR. DESIMONE: Your Honor, Thomas Desimone, appearing on behalf of the State.

THE COURT: Mr. Afriyie, I've had a chance to review your submission, so I know why it is that you are seeking this appeal. I'm to ask you if there if there is anything you want to add further, but, first, let me just put in the factual predicate here.

This matter arose because back on May 28th, 2007 Mr. Afriyie received a series of motor vehicle summonses that –the one that's in question here was a –what is referred to as a refusal, and that is a refusal to submit to an alco test examination.

Ultimately, on September 11th Mr. Afriyie appeared with his attorney, Thomas Shusted, and entered a plea which was conditional to the refusal, a plea of guilty that is, and reserved certain rights, because at that time State versus Chun which was a leading case at that time pending, had

not yet been decided. It later was decided and, accordingly, the , matter was brought back for subsequent hearing before Judge David Krell and that –the first hearing was on July 16th, 2008 and then later on September the 11th—strike that. Let me start over again. The first hearing was on September 11th, 2007 and the subsequent hearing before Judge Krell was on July 16th, 2008. At which time after—Mr. Afriyie was represented again by Thomas Shuster (sic). After hearing arguments it ultimately resulted in Judge Krell determining that the guilty plea was appropriate, should not have it withdrawn and Mr. Afriyie was sentenced, however his sentence was stayed pending this appeal.

Now, Mr. Afriyie, the question here is and I know that you have submitted a comprehensive brief, and you make arguments and some of them are appropriate arguments. I don't meant that they're going to be sustained, but the are appropriate, but some of the other arguments you make—how can I say this diplomatically—they—reflect that it was done pro se and not by a lawyer, in order words, and that's not bad. You did this on your own and it's –it's well done for the most part. I'm not criticizing you, but I'm also—they are also a very highly technical area that we're dealing with here, not the least of which is the standard that this Court needs to use.

For example, just by way of example, you submitted at the trial below medical certifications concerning your condition, right?

MR. AFRIYIE: Yes

THE COURT: And they were considered by the Court. As part of your submissions, however, you have submitted additional information, --

MR. AFRIYIE: Yes.

THE COURT: - - And that additional information is not properly to be considered by this Court. And the reason for that is that this is a trial on the record. So, the record consists of the transcripts of the two hearings and certain

other documents, but I could not consider for you or for Mr. DeSimone the same way; for example, if Mr. DeSimone says, Judge, I now have some additional medical reports that I want you to look at, I would be saying the same thing to him. If he were to say to me, Judge, I have another witness here, I want to call Trooper- - he had a very unusual first name, starts with an e, can't remember it, last name is Smith, I want to call him now because Mr.—Mr. Afriyie says - - takes exception to the fact that he did not testify at time of trial, I can't do that either. So, --and there's certain other things. I could go on, but, again, I don't want to appear to be critical of you or your work.

My question is to you would it -- do you feel that you should have the services , if not Mr. Shuster –Shusted, rather, some other attorney, because, as I say, this is- - this not a truly discretionary decision that this Court will make. In other words, I'm not going to take another look at it and say, well, you know, I think this or that. It's tightly controlled by the laws is what I'm suggesting.

So, just in those two areas, but there are other areas as well. Well, I don't want to go on and –in other words, you-- --you say that Judge Krell acted improperly by assuming the role of a medical expert, see,--

MR. AFRIYIE: Yes.

THE COURT: --and I know why you say that, and I understand it at one level, but an expert opinion was delivered. Judge Krell did not accept that, and there may some reason why he didn't, and I would not expect someone who is not a lawyer to know what those reasons were. For example any medical report has to be couched in terms of a degree of medical certainty.

MR. AFRIYIE:Yes.

THE COURT: Your reports that you submitted said—I'm paraphrasing it. I could read it to you, but you are more familiar,--

MR. AFRIYIE: Yes
THE COURT: --it said that Mr. Afriyie—Afriyie's condition could have been the cause for him to not be able to submit an appropriate sample.
MR. AFRIYIE: Yes.
THE COURT: Well, from a judicial prospective that's not enough. It could have been, but on the other hand if I say something could have been, well, it could not have been as well. So all of this is preliminary to my question for you today do you not feel that it would be more appropriate I will continue the stay for a short period of time unless Mr. Desimone has filed an objection to allow you to consult with an attorney to prosecute this appeal. I think it would be in your best interest, but certainly that would be up to you. Understand all that Mr. Afriyie?
MR. AFRIYIE: Oh yes, Oh yes, I do.
THE COURT: Yes.
MR. AFRIYIE: I think I will—going to do it myself.
THE COURT: You want to do it yourself?
MR. AFRIYIE: Yes.
THE COURT: All right. And, I just want to make sure, because it's - - as I say, you're going to hear in a few moments that it's a complicated issue, and it's not just one issue, and there are certain rules of evidence that are going to be called into play here that - - well,- -
MR. AFRIYIE: Judge, before you finish, you say that I obtain some other documents which were not produced at the Court below.
THE COURT: Correct
MR. AFRIYIE: Ah,--
THE COURT: Some were produced, and I have those as well, - -
MR. AFRIYIE: Yes.
THE COURT: --but the new information, in other words, is what I can't consider.

MR. AFRIYIE: Yes, but the new information, here what go into this the –to prove that the Judge was wrong.
THE COURT: That's see- - that's what I can't do. See, let me- - Let me back up.
MR. AFRIYIE: That is fine.
THE COURT: See I can't hear that because it was not part of the trial below. That information should have been part of the information before Judge Krell, and if it had been he would have considered it, perhaps, but you don't get another chance, in other words, to submit additional information, is what I'm suggesting to you.
MR. AFRIYIE: But as soon as he made those statements, trying to interpret the medical evidence he went and concluded and give this, and so I didn't have any chance to prove to him that he was wrong.
THE COURT: Well, that's - - we 're back to where we started. We started with my advising you that –that additional information- -
MR. AFRIYIE: Uh- huh.
THE COURT: - - even if it's - - even if it's appropriate, it's good information, we are limited to what was here not— nothing new.
MR. AFRIYIE: Yes.
THE COURT: So the propriety of is not - -
MR AFRIYIE: Disregard those.
THE COURT: Yes. I have to disregard. It's not because I- - not because I choose to.
MR. AFRIYIE: Sure.
THE COURT: All right.
MR. AFRIYIE: That's fine
THE COURT: Do you understand?
MR. AFRIYIE: Disregard it.
THE COURT: Okay.
MR. AFRIYIE: Uh-huh.
THE COURT: All right. So you sure you want to proceed yourself?

MR. AFRIYIE: Oh, yes.
THE COURT: Okay. Good. And, I'm not trying to talk you out of it, but I would suggest I would give some additional time, --
MR. AFRIYIE: Yes.
THE COURT: -- continue the stay so you wouldn't pay any additional penalty, and consult with an attorney so that the issues could be better framed, because that's just one of them. That's just one. And I trust you understand that.--
MR. AFRIYIE: Yes.
THE COURT: --that we limited to – I'm limited to what it was that was submitted below.
MR. AFRIYIE: Yes, but I also understand that the Court can go beyond that and- -
THE COURT: That's where I- - that's where your understanding in incorrect. If that's your understanding it is incorrect.
MR. AFRIYIE: Okay. I don't have time to review this, but that's fine. I think that Courts can do that.
THE COURT: It's not a choice that I'm making.
MR. AFRIYIE: Okay.
THE COURT: It's not a choice that I'm saying, well, should I do this, no maybe, yes, maybe no. Additional information that would be submitted at this time I'm not permitted to hear that. That's why it called a trial on the record, --
MR. AFRIYIE: Yes. Understand.
THE COURT: -- and the record is closed. no—I can't have any additional testimony or any additional information. All right.
MR. AFRIYIE: Okay. That's fine
THE COURT: You tell that—you tell me that you have seven arguments why the Municipal Court should be overruled. I'm going to give you a chance to address all of them, but--
MR. AFRIYIE: Yes.

THE COURT: -- just so the record in this case is clear, you tell me that medical reports that you submitted demonstrated that you were unable to give the required volume of breath?
MR. AFRIYIE: Yes.
THE COURT: Yes. You tell me that the State failed to disprove that the medical evidence demonstrated the reasons for your inability to provide. You tell me that your Sixth Amendment right to confrontation was violated because the operator was unavailable to testify, - -
MR. AFRIYIE: Yes.
THE COURT: - - and you tell me that the three foundational documents required were not submitted into evidence, and you tell me that the submitted breath examples that he- - that he, the operator, violated or abused his discretion by terminating the test after only two attempts, and the, finally, the Judge acted improper by assuming the role of a medical expert. So, I've read your submissions, but if there is anything that you want to highlight to me concerning those arguments I would certainly want to hear them now.
MR. AFRIYIE: Yes, Before I do that , I think I have to say a word or two about my brief and what I received from I think Ms. Hussy, something like that, the lady here.
THE COURT: Okay. Mr. DeSimone submitted a brief.
MR. AFRIYIE: I just received this a few days ago. He didn't - - I didn't get a copy from him. I just got this.
THE COURT: And what is it, Sir?
MR. AFRIYIE: Through his brief- - I- - I thought that he was supposed to send me a copy. What I did do was I sent back to my return receipt requested and also the overnight delivery. He got it the following day and if we—does it in due process, I think he should have--
THE COURT: He should have.

MR. AFRIYIE: --sent me a copy. I called the office, and they they—they mailed me this. And, it is stamped here October the 6th.
THE COURT: I –think you are correct in you should have --
MR. AFRIYIE: I--
THE COURT: --you should have received a copy. I have a copy.
MR. AFRIYIE: He send me a copy.
THE COURT: Yes, I have both copies. I don't know what you have, but--but
MR. AFRIYIE: Judge, mine is stamped October 10, from tis office.
THE COURT: I see.
MR. AFRIYIE: Do you want to see it?
THE COURT: No. I take your words for that, sir, so--
MR. AFRIYIE: And, he didn't indicated that he had sent me a copy. He never did.
THE COURT: You should have a chance to review it. I certainly agree. So, with that in mind, do you need additional time? I'm happy to give you additional time to--
MR. AFRIYIE: Well, I just want to bring it to the Court attention this is a violation of my constitutional right toward the due process amendment. I think number 14.
THE COURT: Okay. Assuming that you are right, I want to make it right for you.
MR. AFRIYIE: Yeah, okay.
THE COURT: So I can't go back and change history, but what I can do is allow you additional time if you require it, to either respond to it, to study it, to look at it and address the issues, but I would agree that it would be--
MR. AFRIYIE: What I did do is that I couldn't get enough sleep. I had to use my computer and all that stuff for the past two days, trying to respond to these questions to the way he answered it, but, incidentally, he did not answer my brief. He just set it aside. He never even answered the

question with all my argument. He never did. He should have looked at them.
THE COURT: I have them both. I have read them both. I didn't--
MR. AFRIYIE: Yes.
THE COURT: I didn't know you had a copy, but again, --I hear you. I think you are right. He had yours.
MR. AFRIYIE: Yes
THE COURT: For some reason, mistake, inadvertence, whatever the reason you didn't get a copy, but here we are, and now that we have that on the table if you want additional time I'll it to you. If you want to proceed today let's do that, but what I don't want you to do is to say didn't have enough



time, let's proceed, I'm under a handicap. I mean I can schedule this for two weeks or three weeks, you know, to give--
MR. AFRIYIE: That is fine. Okay. If you could put it in the record that he never responded to--
THE COURT: Well, it is on the record.
MR. AFRIYIE: That's fine.
THE COURT: But that does not give you information should you lose this case on appeal, because I'm giving you the opportunity to read it thoroughly and carefully as you should have had the opportunity to do, and respond to it if you choose to, but if want to waive that and proceed anyway that's okay too.
MR. AFRIYIE: Yeah. I'm waiving that too.
THE COURT: All right. Okay. Tell me sir, then why—if there's anything you want to highlight that is not new material, we've covered that, as to why this Municipal Court decision was improvident or incorrect legally speaking and should be reversed now would be your chance to tell me why.

MR. AFRIYIE: I will deal with my brief in a minute, but in the lower court actually admitted the motion that the plea—not the plea—the guilty plea should be withdrawn, and the Judge overruled him. My point here is it was –his ruling was abuse of discretion. Certainly he had the discretion to say yes or no to a motion, and that discretion is abused if the ruling is based on untenable grounds or is it. And I will give you the reason was based upon tenable ground. And, if my reason is supported a reversal is warranted.
THE COURT: Okay.
MR. AFRIYIE: It is warranted if a different court would have given a different ruling. First of all, I admitted a guilty plea because of what the Court told me. New Jersey has a Statute about refusal, and there are elements of refusal.
In State versus Cummings on page four of my document here you talk about the policeman arrested you. The policeman put you—or it says here believed that you were driving and were in physical control of the vehicle and one element is whether or not the person refused to submit to a test upon request of an officer.Okay. And, it goes on to say that if all the elements are not established then no conviction shall be issued. Judge Weine—sorry—I'm using Judge Weiner, because I went to the United States District Court and that was I defended myself. His name was Judge Weiner. Incidentally, he overrule against me, and this is in District of Pennsylvania. I appealed to the Court of Appeals and I won. I did it myself.
But, anyway, when he defined this sentence he indicated that if you submit a breath test and you produce inadequate form that amounts to refusal. And I said , Your Honor, okay—I pled guilty. I didn't know that producing enough volume did not amount to refusal. If I had known I wouldn't have pled guilty. There's no way I would have done that. That is my first point I want to make, because he misconstrued all the—misinterpreted the law.

So, the basis for my pleading guilty was misinterpretation of the law. And, you can see from the transcript. Do you want me to reflect it, Your Honor, or you've seen it?
THE COURT: No. I'm reading it. He—he cited you to the—and told you that you blew, in other words, that you emitted a certain volume, --
MR. AFRIYIE: Yes.
THE COURT: --which he explains here, and your attorney was there. And, I'm not quite sure that I'm understanding your point. Are suggesting to me that --
MR. AFRIYIE:Your Honor, this is on page nine. Is that where you are?
THE COURT: Yes.
MR. AFRIYIE: Okay. So, he said and do you agree that it was a good enough sample of your breath in order to raise a proper reading. I said yes. Then he said I therefore—and that, therefore, that amounts to a refusal. That is inability to give enough volume of breath was tantamount to refusal.
THE COURT: And do you dispute that?
MR. AFRIYIE: That's not true according to the law.
THE COURT: What—and what law would you cite me to that would get you that result?
MR. AFRIYIE: This is New Jersey NJSA 59. all minus 54-8.
THE COURT: All right.
MR. AFRIYIE: It says "Whether or not the person arrested refused to submit to test upon request of the officer this is one of the elements in connection with the refusal." It doesn't say that failure to produce enough volume of air was—is tantamount to refusal.
THE COURT: I see. Okay. I understand. I understand that point.
MR. AFRIYIE: Yes. That is one—that's one case. So what I'm saying is that I pled guilty because of what he told me the law was, and he was wrong. That's point number one.

Point number two- - I know this is from that , but I—mine and you guys are all the same.
THE COURT: No, don't take me there. We guys are totally different. There are 50 of us around, including Hawai and Alaska and each state has a different set of rules and laws, and a Delaware case, although it might be appro ops there, wouldn't help me here.
**MR. AFRIYIE: But what the standard of review is, is what I'm going to talk about, that is whether or not—and I've said what, but, Judge, abuse of discretion, whether or not the Judge applied the law correctly that is an interpretation of the law if he admits a mistake it's reviewable by a higher Court, and that is what I'm asking this Court to do.**
**THE COURT: Okay.**
**MR. AFRIYIE: So what I have said pinpoint the fact that he misinterpreted the law.**
**THE COURT: Okay I understand that. You are correct.**
MR. AFRIYIE: Very good. Okay. So, that's one point. And that goes long with the abuse of discretion. I think the State is in agreement with me that State versus Chun this Court's rule in this case, I don't think they dispute that, that is Court's ruling of what happened here and we will throughit in a few minutes. I have read it about three times.
Going back to my brief, and then I will touch on it in a minute—okay, first of all, I do indicate element that there's insufficient evidence to support conclusion. Here—and do you have it? I'm going to read it. " A trial Court's interpretation of the law and the questions that flow from established fact are not in conflict to " (indiscernible- heavy accent). And, it's New Jersey 148 366 page 348. I use this in connection with what I have just indicated.
THE COURT: All right. That's –that's rather text book material and we're all—all lawyers are familiar with that general principle.

MR. AFRIYIE: Okay.
THE COURT: Yes. That's standard.
MR. AFRIYIE: So, tha's fine. Let's get number two is that this inference to meet its burden. You see, once I produce the particular evidence which created doubt in State's brief, but which I did—they were to prove that I could produce enough volume to do it. That was their burden of proof. Okay. And, in doing that they showed that the alcohol—alcohol test, and they also brought over a person to do such—that is to give evidence. When the finished I showed evidence to the medical records that I'm a sick man, and I'm still a sick man, and I couldn't do that.
Okay. The burden shifted from me to the State to disprove my case. And my lawyer had sent them a letter. I don't think you have a copy of it. – if I have it. Oh, there it is. The last page indicates—this is from Mr. Shusted—to say "Please" –talking to the State—"please provide me with a copy of the State's rebuttal report prior to the scheduled court date.." If you want to see it--
THE COURT: I'll take your word for that,--
MR. AFRIYIE: Yeah.
THE COURT: -- but there's
MR. AFRIYIE: He wrote to the State. He did send them a copy of my medical records. They had it more than a month in advance, that, please provide us with a rebuttal report about the the medical records, the different date. And when we met on July 16th they necer brought the new medical expert there either to refute.
So, in order words, the doubt created in the case was established. And, you know that in criminal cases or certain criminal cases according to all what I have read here, they still had the burden of proof and to prove it not by a preponderance of the evidence, but by reasonable doubt. I created that doubt and they didn't produce any rebuttal.
THE COURT: But they are not required to Mr. Afriyie. This is one of these things that I--

MR. AFRIYIE: Okay.
THE COURT: --started talking to you I n the beginning. The State is not required to produce. The question was--
MR. AFRIYIE: Uh-huh
THE COURT: -- whether your proof rose to sufficient level. The judge found that it did not.
MR. AFRIYIE: Okay. That is fine.
THE COURT: That's –so they weren't required to produce- - I mean, we don't need to spend time on that.
MR. AFRIYIE: That's fine. That's fine. They said they didn't have the burden to disprove whatever I said, then whatever evidence ' give Judge Krell will say that it didn't rise to a certain level that he could have disregarded it. This I'll go back to the alco test in a minute. Let me finish my—I'll goback to the alco test.
THE COURT: Sure.
MR. AFRIYIE: On the Sixth Amendment right, State versus Chun goes (indiscernible- heavy accent) to indicate that the person who conducts the test should be present at trial. And all the foundation—they either—all the foundation documents should not be produced or cannot be produced, but they do say that to—as a matter of fact, you know, not to violate the defendant's Sixth Amendment right he has to be there. He wasn't. I think you have read my brief where I quote Chun.
THE COURT: Yes. I'm familiar with that. You know, and I don't want to appear to be quarreling with you but, but--
MR. AFRIYIE: No. No. Do ahead.
THE COURT: --this is the same reason that I offered you an opportunity to have the attorney present, because--
MR. AFRIYIE: Uh-huh.
THE COURT:--the problem with that argument is as follows:--
MR. AFRIYIE: Uh-huh.
THE COURT: --it would have been better--
MR. AFRIYIE: Uh-huh.

THE COURT:-- had the officer been present.
MR. AFRIYIE: Yes.
THE COURT: No question about it
MR. AFRIYIE: Uh-huh.
THE COURT: --but you'll recall that--
MR. AFRIYIE: Uh-huh.
THE COURT: --that-- because then there would have been someone to testify as to the volume that you submitted, right?
MR. AFRIYIE: Uh-huh.
THE COURT: But you'll recall that without objection--
MR. AFRIYIE: Yeah.
THE COURT: --at time of trial--
MR. AFRIYIE: Uh-huh.
THE COURT: the medical report that had all that information in it—strike that—not the medical report, the alcohol reading information--
MR. AFRIYIE: Uh-huh.
THE COURT:--was submitted and it became part of the record.
MR. AFRIYIE: Yes.
THE COURT: So I have it, you've have read it, Mr. DeSimone has read it--
MR. AFRIYIE: Uh-huh.
THE COURT: --and it in evidence without objection. The signatory of that report was the gentleman who's Smith and his first name starts with an c that I was telling you about before,--
MR. AFRIYIE: Uh-huh.
THE COURT: --he—he wasn't there, but his report was admitted without objection, you see?
MR. AFRIYIE: Yes.
THE COURT: It's the same problem with the doctors.
MR. AFRIYIE: Uh-huh.
THE COURT: The doctors weren't present either, correct?
MR. AFRIYIE: Uh-huh.

THE COURT: But the doctors' reports were admitted--
MR. AFRIYIE: Uh-huh.
THE COURT:--with some objection by the State, but it was later withdrawn. So the medical reports that you submitted are in evidence without objection--
MR. AFRIYIE: Uh-huh.
THE COURT: --and the readings information—well that's wrong. There was no reading because there was—the State claimed that you refused. I understand your point, but the volume information was in a report.
MR. AFRIYIE: Yeah.
THE COURT: --and it went into evidence, and now it's part of the case. So the fact that he wasn't there at the time is sort of moot. Now, it was a very good point back then, but it's not a very good point now. Do you see--
MR. AFRIYIE: Okay. I--
THE COURT: Do you understand? Do you understand what I'm saying?
MR. AFRIYIE: Yes. I understand what you're saying?
THE COURT: Good.
MR. AFRIYIE: I can read this again. I tell you that, in fact, what they did was that initially they wanted to say that this person wasn't needed. They went through trying to say that this person wasn't needed, but there was- - they went again and give a justification as to why he should be there, but if you are telling me mine was accepted and he was also accepted at this point but--
THE COURT: Neither one of the should have been accepted,--
MR. AFRIYIE: Yes.
THE COURT:--bluntly,--
MR. AFRIYIE: Okay.
THE COURT:-- frankly. When—when--
MR. AFRIYIE: Oh,--
THE COURT: -- when the medical reports were aubmitted and there was no doctor there to testify, to be --

MR. AFRIYIE: Yes.
THE COURT: --cross examine those reports should not have come into the case. Krell maybe should not have heard them. I certainly shouldn't see them, but they were admitted. Likewise, when the provider of the document, Trooper Smith was not there, that shouldn't have come into evidence either, but it did.
MR. AFRIYIE: I'd like to tell why—why I'm saying that it shouldn't have been accepted at all apart from your argument. My argument here is this: State versus Chun for an alco test- - made two indicates that there must be first test- -
THE COURT: I'm sorry?
MR. AFRIYIE: There must be first test.
THE COURT: First test, yes.
MR. AFRIYIE: Yes. There should be a second test. And, specifically indicate that there will be a count as to that, and there should be a third test. Okay.
THE COURT: Okay.
MR. AFRIYIE: There should be three tests at a minimum before there could be a refusal. Let's look at page – I don't know whether you have page 118 or something. This one is page 119.
(Pause)
MR. AFRIYIE: Bear with me. I'll be right with you.
(Pause)
THE COURT: Maybe I can help—maybe I can help you. What are looking for?
MR. AFRIYIE: No. It is my - - I remember that is my brief where I do say something to that. Yeah, okay. On page 14 of my brief.
THE COURT: Page 14 of your brief, yes, sir.
MR. AFRIYIE: Yeah. Uh-huh. This is Chun speaking: "With the measurements for the first breath test are out of the subject rate of tolerance with a measurement of the second breath test." We've had two breath tests now. The

machine prompts –prompts the to conduct a third breath test. It keeps on- - it keeps on. The device gives the operator three minutes to collect a sample. If the time has passed without a sample the device will present with three options. That is after the third test, then the device would present three options to the operator. The options are to repeat the test, report that the person refused the test or continue the test.
So after the third breath test the operator is given three options. One of them is to indicated that the person refused the test. In my case, - - and the report is here.
THE COURT: There were only two tests.
MR. AFRIYIE: No. There were only two tests.
THE COURT: I understand.
MR. AFRIYIE: Very good. So he admitted it, in fact, it was zeros. He made a big mistake. If you you'll go page 14 the Supreme Court said this- - they kept going. They said it said- - it said that the alco test is not operator dependent, meaning that the dependent is not subject to the influences from the operator, and the operator place a relatively lesser rule than possibly the breathalyzer. The Court listed the rule now is clear by the operator. I have it here. It's lighter. It is the report , but I have written it here too. I read the whole thing. He said the record was done- - this is what he said. He said the record was done, the operator will plead a relatively lesser rule than has been with the case in the past. His rule now consists of observing the subject the insure that 20 minutes has passed and to be certain that the subject has not swallowed or regurgitated - - regurgitated. In theis circumstance (indiscernible- - - heavy accident) that would influence the test results.
The operator- - this rule also includes imputing the - - and verifying the operation of the test. I think finding for which he needed to start the sequence. Another rule is changing the control solution, election to do so. Another rule, attaching the new mouth piece, reading the instructions- -

THE COURT: Mr. Afriyie, you know, again I don't want to appear quarreling with you on this, but that - - everything that you're reading is- - accurate, but - -
MR. AFRIYIE: Uh-huh.
THE COURT: - - but wait.
MR. AFRIYIE: Go ahead.
THE COURT: The preface of what you're reading is requirements for the admissibility of alco test results; so if there had been a result that said Mr. Afriyie's blood-alcohol reading was .14,- -
MR. AFRIYIE: Uh-huh.
THE COURT: - - it didn't because- -
MR. AFRIYIE: Uh-huh.
THE COURT: - - the State claims you made a refusal, then all that you're talking about would come into play, - -
MR. AFRIYIE: Uh-huh.
THE COURT: - - but you're taking- -your taking us down a path- -
MR. AFRIYIE: Uh-huh.
THE COURT: - - that doesn't application, see? So, you know, I don't- -
MR. AFRIYIE: Okay.
THE COURT: I don't want to cut you off, but - -
MR. AFRIYIE: Sure.
THE COURT: - - that would have great application if there had been a reading, a blood-alcohol reading that was - - that was improperly done, but it never got to that point, says the State, because you refused.
MR. AFRIYIE: Yeah.
THE COURT: That's- - that's - - so all that you're reading to me is all accurate information, but it doesn't relate to the issues that are before me. The issue before me is did you refuse not whether or not the machine was properly calibrated, whether or not there was a purge, whether - - you see- - the difference?
MR. AFRIYIE: There is no problem. Go ahead.

THE COURT: Okay.
MR. AFRIYIE: No.
THE COURT: Okay.
MR. AFRIYIE: I- - I—I didn't refuse, because he was supposed to observe me at least for the third test. He never did. And, he was supposed to only sit down there. He was supposed to pull in the prompts. He never did. Instead, he's being passive. He was passive. He was actually a participant. All he did was you stop the machine without me giving a refusal. Why did you stop me- - sitting around instead of (indiscernible- - heavy accent).
THE COURT: Okay. So, you're saying he is required ti give you three chances like baseball, - -
MR. AFRIYIE: Minimum.
THE COURT: - - right?
MR. AFRIYIE: Minimum.
THE COURT: Okay. All right. I understand your argument. That two is not enough, he was required to give you three.?
MR. AFRIYIE: He didn't do it.
THE COURT: And, he didn't do it.
MR. AFRIYIE: He wasn't following the prompts. He was supposed to follow the prompts. He didn't follow the prompts. He just stopped. He said I don't need you.
THE COURT: Okay.
MR. AFRIYIE: Do you see what I'm?
THE COURT: I do see what you're saying.
MR. AFRIYIE: The prompt said go ahead, he said no, I'm not going ahead.
THE COURT: Okay.
MR. AFRIYIE: So I never had a chance.
THE COURT: Okay.
MR. AFRIYIE: That's my argument. That's why I'm saying that the whole- - that's okay. Because the guy didn't do for me what he was supposed to do. And, you mentioned this, but the Judge- - a judge- - first of all before

you become a medical expert you should be qualified to do that. Thatis the standard. Could have taken the chance to qualify the Judge, that if it could be done by substitution I don't know. Would have qualified you to give an opinion. Whether or not- - what the doctors were saying were correct.
He chose upon himself to become the medical export and I don't think that is the role of a Judge, but that's what I'm saying.
THE COURT: That's - - you know, that, - - do you see those chairs over there?
MR. AFRIYIE: Yes.
THE COURT: They are for the jury.
MR. AFRIYIE: Yes.
THE COURT: Do you know that not only the Judge but those jurors would have had a chance to pass - - if it had been a jury trial- -
MR. AFRIYIE: Yes.
THE COURT: - - the jury would have passed on the efficacy or the appropriateness of the medical opinion and none of them ever went to any school beyond high school. They would have that chance , see?
MR. AFRIYIE: Very good. No, but this is different from leaving it up to the jury to make that decision. The jury certainly would have listened to the medical expert, but the medical would say, oh, no, he wouldn't say.
THE COURT: Okay.
MR. AFRIYIE: And they do- - conducted- -
THE COURT: I understand the point. He couldn't have- - nobody could have listened to the medical experts in this case because he wasn't there.
MR. AFRIYIE: He wasn't there, but he chose to be- - to be the medical expert, so he was the Judge.
THE COURT: And he made himself - -
MR. AFRIYIE: And he was the executioner, because he passed the sentence, see?

THE COURT: I understand.
MR. AFRIYIE: And he became the proxy prosecutor.
THE COURT: I understand your point.
MR. AFRIYIE: Then, in fact, what he also wanted to do was to use the law of provability. If you remember, I think you've seen what he said. He said- - he didn't use the word probability. He said medical second, okay. And, his argument was that we deal - - we don't deal with probabilities- - no. I think he used the law. Not probable, but likely, Let me see what he said.

(Pause)

MR. AFRIYIE: Well, let's see here. Let's see. Oh, yeah, okay. He said at best it was a general statement made by one physician.. And that was known to two physicians, you see? This is - - he said at best there is general statement by one physician that it is probable- - it is possible that he couldn't give that sample, but of course we don't deal with probabilities - - we deal with possibilities - - we deal with possibilities. We deal with probabilities.
Well, you see my brief here where I mentioned that probabilities- - when probability is zero it means it's almost unlikely. It will never happen, but if the probability's one that it's certain I think it will happen. And in between that is a - - that's - - when you attach confidence, you attach confidence to it. It was the State's burden to prove that Icould have produced verified- - the State did nothing. They didn't bring any medical expert to prove that that wouldn't have done that. And if they didn't do that the probability that it would have produced a required volume not zero, but at least I produced three pieces of medical evidence, two of which indicate that my inability to give that amount could have come about because of my physical incapability. And, from the law of probability that means that at least there was two out three chances that I couldn't have done that.
So, with this logicthe State- -

THE COURT: Okay, I understand your point. I understand your point.
MR. AFRIYIE: Yeah, Okay. So, that is it. Let me briefly touch his stuff. I read it and I will give - - operator is there. It's not a brief. Matter of fact, he just said that I will agree to send you a letter. And, this main point throughout the whole attempt is this, that there was a - - like an agreement. There was a plea bargain and they expected a consequence. I expected some result out of it. And I should be held responsible to fully - - that is I should- - I shouldn't - - I should not negate my promise. Promise was that I accept me to plead. My point in connection with the whole thing is that it was a guilty plea which was wrong from this time, that is we didn't - - I knew the consequence. The consequence was the imposition of the sentence and all that so, okay. **What led me to plead guilty was the misinterpretation of the law.**
If they get up leaving me, - - according to interpretation, **I wouldn't have pled guilty in the first place**.
THE COURT: Mr. Afriyie, thank you very much. I understand all of your arguments. I trust you didn't find me to be quarreling with you, but - - but again you're in areas that are probably not as familiar with so- -
MR. AFRIYIE: Yes.
THE COURT: I think you did an excellent job, but let me hear from Mr. DeSimone, for the State.

Argument - Desimone

MR. DESIMONE: Judge, just briefly, I did outline in my brief my arguments. Essentially, they are that this individual entered a guilty plea. It was knowing. It was voluntary, and the only real question was because State versus Chun was still in it's - - still being reviewed by the Supreme Court that as with all of the alcotests during that periodof time that Chun may have added some new information or changed the way the tests were done, and

everyone was kind of holding their breath waiting for Chun to be announced so that we could all then be on the same page and continue with - - with these cases that were pending, including the Gentleman's.

Unfortunately for him, Chun did not - - the only group of people that Chun addressed specifically in reference to their ability or their inability to give the propervolume for the alcotest was women over 65 years of age, Judge. They were the only class that- - the Supreme Court specifically addressed that because of their - - of that group of individuals that it may have an effect on the machine or their inability to exhale the required volume.

The Court did consider the medical evidence that was submitted, and found that it did not meet the threshold to indicate that, as the Court earlier said, within a reasonable degree of medical certainty that this individual could not produce that volume.

So, it was twofold. The Court had medical evidence that didn't establish that he could not produce the required volume and Chun did not give any additional guidance in reference in reference to every other individual except women 65 years or older that may be affected by their inability to give the volume. **And that's the real issue was did Chun add anything that Judge Krell could have considered in reference to this gentleman's case and it did not.**

I know his argument is that , you know, he did not refuse, because he attempted to take the test. Now, I addressed that ir my brief, because the implied consent that you will take a breathalyzer has been interpreted to mean that you also - - there's an implied consent that you will do the test properly or at least attempt to do the test properly. The state trooper in this particular case gave this gentleman two opportunities. I think that weas all he was required to give before he determined that this individual refused to take the test.

In his brief he quotes Chun and , again , Judge, that language as I read it would indicate that the only time a third test is done is if the machine is registering a number, but the first number is out of sync with the second reading and the the machine purges itself and requires a third testto try to come into some kind of conformance with if there's something malfunctioning someone should not be punished for the malfunctioning of the machine. I don't interpret it to maen that they- - that the operator's required to give them 11 tests, which apparently the alcotest will take 11 tests.

The very next paragraph the device gives the operator three minutes to collect each sample. If that time expires without a sample, which I would indicate if you don't blow hard enough, it's not going to register a sample, the device would present the operator with three options: the option to terminate, report the person has refused or continue. I this particular case the Trooper after two tests determined to not require any more testing and then had made that decision that this individual had refused the test.

I have outlined in my brief the different interpretations of a refusal and our courts have considered refusals including at least giving at least two attempts before it would be considered a refusal, **and it's the State's position that the guilty plea was entered.** There was really a question of would Chun have affected any of the documents that were presented. They did not. Again, Judge Krell did consider the medical reports that were submitted, and just did not find that they rose to the level to indicate that this individual was – did not have the ability to exhale the required volume to register on the machine, Judge.

THE COURT: All right. Mr. Afriyie, I thank you. Mr. DeSimone, I thank you.

MR. AFRIYIE: Judge can I- -

THE COURT: Yes. You need to- - yes, some additional comments- -

MR. AFRIYIE: Yes.

THE COURT: - - Mr. Afriyie.
MR. AFRIYIE: I've read Chun and even though Chun actually goes at length to talk about the situation as far as a woman is concerned, but Chun also says and reiterated the previous order that says we ordered that first offrnder cases, in which case like mine- - first offender- - cases involving the alcotest be tried based on clinical evidence when available including but not limited to objective - - of sufficient evidence as well as the alco test- - test results. That is- - Chun that based upon clinical evidence there are people who might not give the required volume. So for them to say that - - or for them to make this statement , and I do not say this in my brief, it is not really who- - who are first offenders. That is Chun contemplated people other than - -
THE COURT: I'm sorry? Contemplated what?
MR. AFRIYIE: Contemplated others.
THE COURT: Others.
MR. AFRIYIE: Other offenders besides women, because if Chun wanted to limit the knowledge as to only women they would have said that. They wouldn't have said offender- - first time offenders. Women are not going to be considered only the first offenders.

And besides, if you want to talk about women the age is not determined by clinical evidence. You said first offenders if you consider the clinical evidence Chun is talking about the age, 65 and over. Of course it said over. And, you don't need clinical evidence to prove age. Age is proved chronologically, when the person was born and you keep adding.

So, but my point is that if you read this carefully you will notice that it was not only with women. **Besides what my attorney wrote here, and I agree with him, the significance of the lowered breath blow rests less with evidence utilized to support a charge of drunk/driving and more with - - and more in the relationship to a**

**charge of refusal. For this individual goes without saying the edge- - the most significant breath blow may not be used as proof on a charge of refusal. His is different from mine. His is on page 105, but mine is - - I don't know who that is, but mine is different.** Mine is different previous. His is page 0 something, and mine is page I think 57 or something like that. Can I show you this paper?
THE COURT: What are you reading from there, sir?
MR. AFRIYIE: From Mr. Shusted to Jack--
THE COURT: Oh.
MR. AFRIYIE:--Jack Krell, and also to the attorney, the State attorney.
THE COURT: Okay.:
MR. AFRIYIE: and it's page 105.
THE COURT: Okay. That was not part of the record below. That was correspondence that was --
**MR. AFRIYIE: Oh no.**
THE COURT: - - exchanged. Exchanged.
**MR. AFRIYIE: Quoted from <u>Chun.</u>**
**THE COURT: Yes. Okay**
MR. AFRIYIE: Yeah. And, he say that the most sufficient breath blow will be not use of proof on a traffic refusal for those individuals
THE COURT: For those individuals?
MR. AFRIYIE: Yes. That is good- - for true critical evidence. Critical to who or they would produce enough volume.
THE COURT: That's true.
MR. AFRIYIE: Yeah.

The Court - Findings

THE COURT: So, for those- - for those classifications of people they're presumed that they cannot comply. Gentlemen, I thank both. And I don't want to keep this in suspense. What I propose to do, Mr. Afriyie, is I'm going

to reserve decision on this, and I'll explain to you why, but we can cover some of the ground today. I do have some other things to do and I want to move on. I'm not in a hurry, but this matter would—require some careful consideration because of all of the issues, but, first, let me just speak about a couple of things that are inherent in municipal court appeals.

First of all, as I have said to you, Mr. Afriyie, I'm limited to what happened below so I can't consider any factual, new factual information, new reports, new documents or anything like that so that's why I did not consider your additional medical information. That might have been helpful had it been submitted to Judge Krell at the - - at the appropriate time.

So, I'm limited to the information that was given to Judge Krell. I'm limited to the documents that were submitted and marked into evidence. I'll just say as an aside that perhaps the medical reports should not have been admitted because you cannot cross-examine a report. That should have required the medical doctor to be present. Perhaps he could have cleared this up for the Court. He wasn't there. It's too late for that. The document was admitted.

Likewise, with regard to the report that was- - that indicated the volume, that was admitted without objection even though the author of that report, the trooper, was not present and did not testify, but his report went into evidence without objection.

**Likewise, the trooper who was a witness, not the trooper who administered the test, but the trooper who was a witness, testified concerning observations of Mr. Afriyie. So, that's the information that I consider together, of course, with the Chun decision and any other law which I would be obliged to consider.** But, first, let me just- - we can make this a lot simpler because, Mr. Afriyie, your argument that the Judge without medical

information appointed himself as a medical expert, is not a well-founded argument for the following reasons: that a fact-finder, whether it is a Judge or jury is permitted to hear an expert testify and just because the person is an expert and there was no qualification of this doctor as an expert. Had he been present his qualifications would have been where he went to medical school, what his practice consists of, things like that, and he would have been perhaps indicated as an expert. We'll never know that either, but let's assume that he is an expert or they were experts. There were more than one doctor's reports. Any Judge or jury would be permitted to accept as that which the doctor said or to reject the doctor. The simply because he's an expert and jurors and judges are not does not mean that the witness needs to be believed. So, I could have the world's greatest expert here on stand and the jury could make a determination that we don't accept what he- - his opinion.

But, in any event, any medical opinion or any other professional opinion has to meet a certain threshold standard is within a reasonable degree of medical certainty concerning things have happened in the past or within a reasonable degree of medical probability if it's concerning things that might happen in the future. The reports submitted did not reach that standard the Judge found, and he found that because the reports in essence says it could have been the reason, but inherent in that is it could have been and it could not have been. He didn't say that, the doctor didn't, but that was why Judge Krell started speaking about possibilities and probabilities.

Probability you can look up in Webster's Dictionary, but that won't help you in this context. Because in this context probability is a term of art. It has a particular meaning in the law, and it means more likely than not. So if the doctor says it could have been the reason that may - - that was not sufficient for Judge Krell because he did not say within a reasonable degree of medical certainty that,

indeed, was the reason and this is my opinion. Had he said that your arguments on that point, Mr. Afriyie, would have been much greater.

Had he been present to testify your attorney could have asked him those questions with a little more pointedness and maybe the doctor would have offered that opinion, but that is the price that everyone pays when the show up for trial without the personsbeing present and rely on their reports.

So, I'm telling you this because I'm going to reject the argument that you advance that the Judge in some way usurped the position and placed himself ahead of the doctor because that happens every day in Court in the country let alone in New Jersey. That is to say that experts offer opinions. Jurors and judges accept them, sometimes they do not accept them sometimes, but if they are not within the requisite standard, that is within a reasonable degree of medical probability that enhances the Judge's or the jury's ability to reject it. So that argument- - that argument bfails.

With regard to your question concerning doubt, yes, the doctor's reports did inject I would suppose without question some doubt into the refusal issue, but the standard that the State has to meet is is it beyond a reasonable doubt. So the fact that you may have injected some portion of doubt, some small portion doesn't mean that you prevail. Some doubt is okay. The State's obligation is to prove as you pointed out the refusal beyond a reasonable doubt.

A lot of the information you started to tell me and I only interrupted you because it did not have application to the case that is the - - how the alcotest works and the calibration, the other sampling, all of that would have application were there to have a reading by the machine. **Never got to that point because the operator properly, says the State, improperly you say, exercised discretion and said this gentleman isn't trying. He is - - and I don't want to characterize the witness as trooper, but he- -**

**that is why I want to reserve. I want to read his testimony again. Not the operator, but the other trooper said some unflattering things about Mr. Afriyie and said that he wasn't trying, didn't - - didn't make a good effort, things of that sort. That information is in the record.**

**So to sum up in terms of where I'm going, the issue is whether or not this guilty plea should be withdrawn, and the basis of the guilty plea was whether or not there was a refusal. Any waiver of the right to - - to go forward would have to be a knowing and voluntary waiver.** And , Mr. Afriyie raises the issue that his waiver of the trial was based on insufficient information, improper information, so forth. It is mind- - I'm mindful of course that he had an attorney present who- - with whom he perhaps should have conferred on that. He wasn't alone as he is today. He had counsel with him, but I'm limited to the record below and I'll consider it again carefully of course and will announce my decision on November the 7th, and the reason for that is I'm going to be away next week, Mr. Afriyie. I'm going on a vacation, and I- - but I will be back, review this.

And it' not required that you be here. But I intent to probably reduce it to writing, but if I don't reduce it to a wriying I will make a decision on November the 7th. I will continue the stay so that you won't suffer any adverse consequences as a result of this were the – were your application to be denied and I'm not saying that that's going to be the case, but regardless, I'll continue the - - the stay. I'll take another look at it carefully and in light of your arguments here today, Mr. Afriyie, and Mr. DeSimone, and will announce the decision some time on November the 7th, which is a Friday

MR. AFRIYIE: What about the Judge's interpretation of the New Jersey Statute where it says that given (sic) insufficient breath will amount to refusal?

THE COURT: Okay. This is an issue in the case. The question is obviously if you had simply refused, no, I'm not touching that , I'm not doing anything that would be a refusal. You would agree. Everybody would agree. Whether you're giving an insufficient volume is tantamount to a refusal is an issue in the case, and that point you raised, and I'll address that. I heard your point on that, that certainly everyone would agree if you simply put your hand over your mouth and refused, like that, that would be a refusal, no doubt about that. You didn't refuse in sense that you didn't extend some effort, but if you made a small effort and not enough then is that a refusal, is that not a refusal? s that the same as a refusal, that's the issue that is in question.

I'll consider it carefully. I thank you for your - - appearances today, gentleman, both of you, and your submissions. And November 7th it will either be on the record or in the mail. Do I have- - I think I saw Camden, but then I thought New Jersey, but it' Camden Delaware. All right. Let me make sure that - - yes. 212 Loan Tree, that's your address. All right. Thank you very much, gentlemen. Appreciate your- - and I will reserve. Okay. Thank you.

CERTIFICATION

I, Janet Barbieri, the assigned transcriber, do hereby certify the foregoing transcript of the videotape recorded proceedings in the Salem County Superior Court, on October 10, 2008, is prepared in full compliance with the Transcription Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

DATE: 12/22/08 SIGNED----------

JANET BARBIERI AOC #131